# A Pluralist Case for the Harm Principle

GONÇALO ALMEIDA RIBEIRO*

## I.

Should the law interfere with individual choices and actions that cause no harm to others but that are regarded as wrong? Is it permissible for the law to restrain individual freedom not for the sake of preventing harm to others but in order to prevent people from performing immoral deeds or from debasing or harming themselves? Doubtless that is the purpose of some laws, although it is not always easy to tell which and to what extent, since most laws pursue, or can be interpreted to pursue, a variety of goals. Standard examples of moralist legislation, such as the criminalization of bigamy, and of paternalist legislation, such as bans on the sale of body parts, may with more or less ingenuity be construed as measures taken to prevent harm to others. It seems indeed that it is not so easy to isolate obvious cases of laws uniquely infused with moralist or paternalist concerns.[1]

But neither is it impossible. In two of its most famous decisions—*Bowers v. Hardwick* and *Lawrence v. Texas*—the United States Supreme Court addressed the issue of whether laws in Georgia and in Texas punishing acts of sodomy or "deviant sexual intercourse" taken in private by consenting adults, particularly in the case of Texas by adults of the same sex, are

* © 2017 Conçalo Almeida Ribeiro. Católica Global School of Law and Católica Research Centre for the Future of Law (Lisbon). LL.M., S.J.D., Harvard Law School. Email: gar@ucp.pt. I am grateful to Chris Wonnell, Doug Husak, Jorge Pereira da Silva, Larry Alexander, Luís Pereira Coutinho, Michael Moore, Miguel Nogueira de Brito, Rui Medeiros, Steven Smith, and Pedro Múrias for their comments on an earlier draft. All errors are mine.

1. On the distinction between moralist and paternalist concerns, which is of little relevance to my argument, see H.L.A. HART, LAW, LIBERTY, AND MORALITY 4–6, 30–34 (1963).

compatible with the due process clause of the Fourteenth Amendment to the United States Constitution, where it provides that "nor shall any State deprive any person of . . . liberty . . . without due process of law."[2] I suppose the criminalization of sodomy is a good example of unambiguously moralist or paternalist legislation—indeed, it is often both of these at once, since the most common justification offered for such laws is that they enforce the conviction of a majority of the community that sodomy is immoral and that they prevent people from using their sexuality in a way that is unnatural, undignified, and corrupt.

It does not follow, of course, that legal moralists, the people who believe the law may be legitimately used to enforce morality or prevent harm to oneself, must support these laws. They may well oppose them on various grounds, ranging from concerns about privacy and liberty to considerations of expediency and prudence.[3] Distinctive about their position is the fact that they take stock of moralist and paternalist reasons in their musings over the propriety of these and indeed any laws. In a nutshell, their standpoint is that immorality and harm to oneself are valid reasons, though perhaps not always or even ordinarily definitive reasons, for the law to restrain individual freedom.

The most notorious and eloquent critic of that view is John Stuart Mill, who set out to defend in his essay *On Liberty* "one very simple principle . . . to govern absolutely the dealings of society with the individual," a principle that came to be labelled "the harm principle" (HP).[4] It is worth quoting his opening statement of the principle at length:

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to

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2. Bowers v. Hardwick, 478 U.S. 186, 190 (1986); Lawrence v. Texas, 539 U.S. 558, 562 (2003); U.S. CONST. amend. XIV.

3. *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS, at v (1965) ("[I]t is the duty of society, if it can, to save any youth from being led into . . . [homosexuality] . . . although it may mean much suffering by incurable perverts who seem unable to resist the corruption of boys. But if there is no danger of corruption, I do not think that there is any good the law can do that outweighs the misery that exposure and imprisonment causes to addicts who cannot find satisfaction in any other way of life."). The view that the enforcement of morality should be subject to a judgment balancing moralist reasons with countervailing concerns can be traced back at least as far as 1 THOMAS AQUINAS, SUMMA THEOLOGICA PART I–II, at 1017–18 (First Am. ed., Fathers of English Dominican Province trans., 1947) (1485).

4. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 13–14 (John Gray ed., Oxford Univ. Press 1991) (1859).

> do so would be wise, or even right . . . To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[5]

Notice that the HP, as stated by Mill, contains two distinct propositions that might be termed the "positive principle" and the "negative principle." The positive principle concerns the assertion that there are good grounds— albeit, as we shall see later, only *prima facie* good grounds—to restrain individual freedom in order to prevent harm to others. The negative principle establishes that it is wrong to restrain individual freedom for moralist or paternalist reasons. It is this latter proposition, the core claim of Mill's essay and the focus of the longstanding debate triggered by it that shall concern us; according to this core negative variant, the case for the HP is really but a case against legal moralism.[6]

Mill's target is not only legal moralism but social moralism at large. He argues with equal vigor for individual freedom and against "compulsion and control . . . whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion."[7] By the latter he means the pressure felt by individuals "under the eye of a dreaded and hostile censorship" to conform to the prevailing social norms and the accepted lifestyles of the community, what he calls "the despotism of custom."[8] His subject is not the grounds and limits of legal restraints on individual freedom, nor even the broader issue of limited government, but the border separating the "sovereignty of the individual" from the "authority of society" in both its organized and diffuse incarnations.[9] Although there is much to be said for this broad treatment of the matter, I shall confine my attention to the narrower point of whether the HP should be accepted as a criterion to define the proper scope of the law.

The issue is often framed even more narrowly, reflecting what we might call a "criminalist bias." It is presented as a question about whether acts that are self-regarding, in that they cause no harm to others, may be subject to punishment. It is true that most of the debated examples of moralist and

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5. *Id.* at 14.
6. I am grateful to Michael Moore for pressing me to be clear on this point.
7. MILL, *supra* note 4, at 14.
8. *Id.* at 68, 78.
9. *Id.* at 83.

paternalist legislation are taken from the field of criminal law, presumably not only because that is the area where the consequences of legal interference with individual freedom are more salient and dramatic but also because even the most stringent legal moralists concede that an act must have a vicious character or self-destructive consequences to justify legal proscription. Once that threshold is met, it seems quite appropriate to regard the matter as criminal in nature.

And yet the HP reaches way beyond the realm of crime and punishment. For starters, it encompasses not just criminal prohibitions—acts that are regarded as felonies or misdemeanors, and are accordingly met with punishment—but any form of legal proscription of self-regarding behavior, including infractions but also regulations that ban the supply of substance —e.g., alcohol—or services—e.g., paid sex—the consumption of which is deemed immoral or harmful to oneself. The HP targets as well positive duties to perform certain kinds of self-regarding acts, such as participating in religious festivities or giving money—in the form of taxes—to a charity, and the refusal of the law to enforce promises and agreements on account of their wicked or degrading nature, such as the sale of body parts or surrogacy agreements. The law may also encumber without going as far as interdicting activity considered undesirable—say, taxing the consumption of certain kinds of goods or requiring burdensome formalities for the enforcement of certain types of agreement.[10] Legal moralism may hence be pursued through all manner of laws—not just criminal but also tax, contract, family, regulatory, and other laws—and with varying degrees of compulsion, ranging from punishment to steering or as little as nudging self-regarding behavior.[11]

The diversity of means should not, however, distract us from the two shared features of legal moralism in any of its forms: it is governed by moralist or paternalist reasons and it ultimately involves coercion at some point, be it directly—against the recalcitrance of the agent whose behavior is the concern of the law—or indirectly—against those who supply such agent with undesirable stuff—and positively—punishing offenses or enforcing commands

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10. Mill equivocates on this point. *See id.* at 111–12. He claims that indirect taxation aimed at increasing public revenue but subsidiarily set to discourage undesirable —albeit socially harmless—activity is permissible under the HP. *Id.* He writes that "it must be remembered that taxation for fiscal purposes is absolutely inevitable . . . [that] it is hence the duty of the state to consider, in the imposition of taxes, what commodities the consumers can best spare; and *a fortiori*, to select in preference those of which it deems the use, beyond a very moderate quantity, to be positively injurious." *Id.* at 112. The argument is disingenuous and incoherent with the basis thesis of the essay, since indirect taxation does not have to target specific goods and the HP requires that the government refrains from deciding which goods are desirable and in what amounts. *Id.* at 111–12.

11. *See generally* DEVLIN, *supra* note 3 (devoting chapters to the role of morals in various branches of the law, including: criminal, tort, contract, and family).

—or negatively—refusing to enforce unlawful agreements. Such features mark out the boundaries of the subject.

## II.

Why should the HP be accepted? It is tempting to argue that the basis of the principle is political neutrality, the idea that the government should remain neutral regarding the rich diversity of conceptions of the good life held and practiced by the citizenry. Many persons hold views, more or less explicit and more or less examined, about the proper way to lead their lives. The full range of considerations that fall under that domain has been called for a long time, at least since the days of Socrates, ethics or the knowledge of what it is—and how to—live well. In the tradition of post-Enlightenment culture, particularly romantic and existentialist, which largely grew in rebellion against the view that one can know how to live well, the ancient concept of ethics has become more and more foreign to popular conceptions of value, and its place was taken by the notion of a quest for the meaning of life, sometimes in the form of discovering, sometimes as the process of creating, the meaning of our lives, and occasionally as a request that we recognize that life is meaningless. What all such views, about living well and the meaning of life, have in common, is that they concern our ultimate ends or conceptions of the good.

It is clear not only that there are many rival conceptions of the good but that each of those conceptions characteristically draws, not always explicitly, on a wide range of metaphysical and epistemological premises and arguments, the truth and validity of which are contentious matters as well. In a word, conceptions of the good are often formed, developed, and re-examined in the light afforded by what John Rawls calls "comprehensive doctrines," or what are ordinarily called worldviews.[12] Neutrality is the view that it is not the business of political authority and of the laws it enacts and enforces to take sides in the dispute among the citizens as to what makes a life worth living or what worldview is correct. As Joseph Raz put it: "governments must so conduct themselves that their actions will neither improve nor hinder the chances individuals have of living in accord with their conception of the good."[13]

12. *See* JOHN RAWLS, POLITICAL LIBERALISM at xviii, 12–13 (1993).
13. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 108 (1986).

The HP seems to follow quite straightforwardly from the concept of political neutrality. If the government is not to act on the basis of any comprehensive doctrine or conception of the good, the law should not interfere with individual choices where these have no harmful effects on others. Any such interference is inevitably informed by notions of the rightness and goodness of human action that furnish illegitimate grounds for political decisions; the HP is thus one, though not the only one, and perhaps the most significant of the practical corollaries of neutrality.

But arguing for the HP from political neutrality is an enterprise doomed to failure, even if we brush aside the unsettling ambiguities of that notion.[14] It merely transfers the burden of justification from the HP to neutrality itself. And it is not by any means obvious why the law should be neutral on so-called comprehensive matters or regarding rival conceptions of the good. It is true, of course, that liberals tend to find the ideal of neutrality extremely important and seductive; nonetheless, there is a lot of work to be put into the task of justifying such importance and to make sense of such seduction, and asserting dogmatically the concept of neutrality does not contribute to it any more than asserting dogmatically the HP. That there is close affinity between the HP and the ideal of neutrality is undeniable, but the latter is hardly explanatory of what makes the former compelling.

The most attractive candidate to serve as a ground for neutrality—the principle of equal respect—does not quite justify it in the full extent required to support the HP. We might hold that what makes neutrality necessary is the duty to treat all persons with equal respect coupled with what Rawls calls "the fact of reasonable pluralism."[15] It is the case that what we have in our societies is not just a diversity of worldviews and conceptions of the good; the disagreement among the various contenders is reasonable, since none is able to make a case for the view it holds such that the opponents are rationally bound to embrace it. Each view in contest has to be regarded neither as unreasonable nor as true, but as respectable and possibly true. But not all self-regarding agency is based on reasonable or respectable conceptions of the good, and sometimes it is not even reflective of any such conception. Most liberals have not given this point the importance it merits. After asking "[w]hat does it mean for the government to treat its citizens as equals?" Ronald Dworkin spells out the liberal view:

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14. *Id.* at 110–33.

15. *See* RAWLS, *supra* note 12, at 36–38; *see also* JOSHUA COHEN, MORAL PLURALISM AND POLITICAL CONSENSUS IN THE IDEA OF DEMOCRACY 270–91 (David Copp et al. eds., 1993); Charles Larmore, *The Moral Basis of Political Liberalism*, 96 J. PHIL. 599, 611 (1999).

> [T]he . . . government must be neutral on what might be called the question of the good life . . . Each person follows a more-or-less articulate conception of what gives value to life. The scholar who values a life of contemplation has such a conception; so does the television-watching, beer-drinking citizen who is fond of saying "This is life," though he has thought less about the issue and is less able to describe or defend his conception . . . The [liberal] theory of equality supposes that political decisions must be, so far as it is possible, independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group.[16]

What Dworkin fails to explain is why the government does not treat citizens with equal respect if it discourages unreflective practices or disregards unreasonable preferences. Citizens demand equal treatment of their lifestyles insofar as these are worthy of respect, and there is hardly anything respectable about the choices of the television-watching, beer-drinking citizen, and of all those who fall prey to "gambling, or drunkenness, or incontinence, or idleness, or uncleanliness" and other "things which have been tried and condemned from the beginning of the world."[17] The limit that neutrality draws on political action is based on the idea that government officials have no title to settle the ongoing dispute in society about which of a large number of competing worldviews is correct, but it has no purchase on legal interference with the class of self-regarding acts that cannot be referred to any plausible conception of the good or that proceed from either thoughtlessness or weakness of the will. From the premise of equal respect, therefore, one cannot argue for the HP in its full extent, but only for the freedom to perform self-regarding acts that reflect reasonable conceptions of the good, and more broadly for lifestyles that are reasoned and cohere around some intelligible and defensible plan.[18]

## III.

Equal respect—coupled with the fact of reasonable pluralism—furnishes a partial case for the HP. I will advance other partial and only partially overlapping grounds, and conclude that the best case that can be made for it is a pluralist one, in the sense that the HP is not grounded in a single reason

16. RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985).
17. MILL, *supra* note 4, at 89.
18. The notion of "plans of life" is developed in JOHN RAWLS, A THEORY OF JUSTICE 407–16 (1971).

or ground but in a broad coalition of reasons or grounds, including—apart from the principle of equal respect—moral worth, self-government, experimentalism, and individualism.[19] In this section of the Article, I develop the argument from moral worth, leaving the other three for the next section.

Laws might regulate self-regarding conduct with the aim of enforcing morality by preventing people from performing wicked deeds, which seems to be one of the purposes behind the punishment of sodomy, fornication, bestiality, incest, adultery, homosexuality, prostitution, bigamy, and other types of sexual activity regarded as crimes in some jurisdictions. It is surely one the chief aims for punishing so-called victimless crimes, which include at least some of those just listed. It is fairly obvious that in many instances objections against laws of this kind can be leveled from the standpoint of equal respect and reasonable pluralism, particularly when the relevant moral judgments rely on religious premises that are hotly disputed in the public square. But even if we assume the existence of a reasoned community consensus on the immorality of some of these and other self-regarding acts, it is worth asking what exactly is achieved through the enforcement of morality as such. Where exactly is the moral value in coercing someone to do the right thing? Do I honor my moral duty to donate money to a deserving charity if I do it for fear of punishment, in order to reap a tax benefit, or to win the approbation of my community? The phrases "coercion into charity" or "forcing people to be good" seem to be little more than bizarre oxymorons that, however well-meaning, will inevitably lead to painfully misguided policy decisions. The observance of moral requirements is worthless unless it is motivated by a desire to attain goodness and rectitude, the values towards which the moral order guides human beings. H.L.A. Hart put the point ably:

> [A] very great difference is apparent between inducing persons through fear of punishment to abstain from actions which are harmful to others, and inducing them to abstain from actions which deviate from accepted morality but harm no one . . . [W]here there is no harm to be prevented and no potential victim to be

19. It is important not to confuse pluralism in this sense—what we might call "justificatory-pluralism"—with other familiar deployments of the term pluralism in practical philosophy, namely "political pluralism" and "value pluralism." *See* Elinor Mason, *Value Pluralism*, STAN. ENCYCLOPEDIA PHIL. (July 29, 2011), http://plato.stanford.edu/archives/sum2015/entries/value-pluralism/ [https://perma.cc/P84Z-SNGE]. Political pluralism concerns the existence of a plurality of worldviews in society, or the fact of reasonable pluralism. *Id.* Moral pluralism concerns the existence of a plurality of values in morality, irreducible to some higher or master value. *Id.* A pluralist case for the HP *does not* entail moral pluralism; it is possible that the various complementary grounds that I offer for the HP point towards a single master value—say, human dignity—just as it is that they form an irreducible, or partly irreducible, plurality of values. What is clear, though, is that appealing to an abstract and contested value such as human dignity does very little to warrant our commitment to the principle, and that is precisely what concerns us here.

> protected, as is often the case where conventional sexual morality is disregarded, it is difficult to understand the assertion that conformity, even if motivated merely by fear of the law's punishment, is a value worth pursuing . . . This does not mean that we cannot intelligibly attribute value to lives dedicated to ideals of chastity or self-denial . . . But what is valuable here is voluntary restraint, not submission to coercion, which seems quite empty of moral value.[20]

Hart seems surprisingly oblivious to the fact that we owe Immanuel Kant the most elaborate version of that claim, and it is worth examining it in some detail. According to Kant, action in conformity with duty is merely legal action, devoid of any moral value; only action from duty, prompted by the "ethical incentive" of respect for morality and its demands upon rational agency, is a source of moral value.[21] It is hence in the nature of morality that it cannot be enforced.

The *Groundwork of the Metaphysics of Morals* proceeds from the assertion that nothing in the world "could be considered good without limitation except a good will."[22] Good is an appraisive concept that we use to judge all sorts of things—"Peter is a good piano player" or "this medicine is good for headaches"—but there is something conditional or relative about most such uses. To be a good piano player is to be good at—or relative to—a certain activity and a good medicine is good to relieve pain or cure an illness. One indication of the merely conditional worth of these things is that there is a range of synonyms for the word 'good' in the examples—dexterity or adroitness, in the first example, and suitable or fit, in the second. Even things that are ordinarily taken to be good for their own sake—such as health and happiness—are not unconditionally good; for instance, a sadistic torturer may be quite happy. According to Kant, the only thing in the world that is unconditionally or absolutely good is a good will.

To say that the only unqualified good in the world is a good will is evidently not a definition of "goodness" or moral value, since the phrase "good will" repeats the term that requires definition. Kant is concerned at this stage not with the content but with the object of moral value, that is to say, with the things of which it is appropriate to say that they either have or lack unconditional goodness. His claim is that good in that sense is a predicate of the will, a proposition that has a series of negative

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20. HART, *supra* note 1, at 57–58.

21. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor ed. & trans, Cambridge Univ. Press 1998) (1785).

22. *See id.* at 7.

implications. First, what he calls "gifts of nature"—e.g., courage and perseverance—and "gifts of fortune"—e.g., power and riches—have no "inner unconditional worth," courage or money can be put to either good or evil uses.[23] Likewise, the effects accomplished through one's actions, including those for the sake of which the action is undertaken, are of themselves neither good nor evil, however desirable or agreeable—or their contrary—they may be.[24] A failed attempt to rescue a drowning person is no less worthy of moral appraisal than a successful attempt, so long as the rescuer in each situation evinced an equal degree of commitment.[25] The efficacy of one's actions is a fortuitous matter, foreign to one's will.

Satisfied that he has established the will as the bearer of moral value, Kant proceeds to "explicate the concept of a will that is to be esteemed in itself."[26] He turns at this juncture to the concept of duty because "it contains that of a good will," by which he means that we rely on assertions about duties to issue moral judgments.[27] Four options are open to an agent subject to duty: acting against duty; performing a duty for the sake of another end; performing a duty from inclination; and acting from duty.[28] Since Kant's purpose is to explicate the concept of good will, he quickly sets aside the first two. He says it is "much more difficult," although critical, to distinguish the third and the fourth. He argues from examples, such as the following:

> [To] preserve one's life is a duty, and besides everyone has an immediate inclination to do so. But on this account the often anxious care that most people take of it still has no inner worth and their maxim has no moral content. They look after their lives in conformity with duty but not from duty. On the other hand, if adversity and hopeless grief have quite taken away the taste for life; if an unfortunate man. . .wishes for death and yet preserves his life without loving it, not from inclination or fear but from duty, then his maxim has moral content.[29]

Kant is not suggesting that there is something reproachable about having an inclination to survive, or that we have to feel miserable in order to be moral.[30] His point is that our duty to preserve life is not conditioned by our natural inclination to survive; feeling suicidal is never a good reason for committing suicide. On the contrary, it is precisely when the incentives of inclination and duty pull in opposite directions that the

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23. *See id.* at 7–8.
24. *See id.* at 8, 13.
25. Kant endorses the proverb "the road to hell is paved with good intentions." *Id.* at 8. A good will is an *acting will*. *Id.* "[A good will is] not, of course, a mere wish but [a] summoning of all means insofar as they are in our control." *Id.*
26. *Id.* at 10.
27. *Id.*
28. *Id.* at 10–11.
29. *Id.* at 11.
30. *See* Christine M. Korsgaard, *Introduction* to KANT, *supra* note 21, at xiii, n.6.

character of one's will is tested. That is why the concept of moral value or good will benefits from an analysis of the concept of duty—we understand what makes a will good when it resists an inclination to flout duty. Morality or goodness is the property of a will that is moved to do what is right even when that implies acting against inclination. To have a duty, therefore, is to have a necessity to act—or refrain from acting—in certain ways irrespective of the contingencies of one's inclination. Since it is characteristic of laws that they are necessary—law-like—Kant defines duty as "the necessity of an action from respect for law," where the law in question is a law of the will instead of some other type of law, say of logic or of nature.[31] What he means is that duty—the law of the will—is not conditioned by inclination.

From his analysis of the concept of good will Kant manages to locate the source of moral value in a specific incentive for action distinct from and defined by contrast to inclination: respect for law. Yet the argument appears to provide no clue as to what is the content of such law. Kant, however, takes no further step before asking: "[W]hat kind of law can that be, the representation of which must determine the will . . . in order for the good to be called good absolutely and without limitation?"[32] As the moral law governs the will irrespective of—and even against—inclination, Kant sidesteps the inquiry into the content of the law and claims that morality's universal form furnishes a test for our maxims of action. Morality requires that we act from principles the validity of which is not borrowed from inclination, that is, unconditioned by our feelings, wishes, desires, and the like. That leaves no other option but "the conformity of actions as such with universal law."[33] That is, I know if my maxim embodies a genuine moral duty if I have reason to hold on to it when I abstract from my inclinations, i.e. when I will it to become a universal law. That is the only possible basis of morality.

When we make it a maxim to act on some inclination—e.g., I will cheat on today's match in order to win and earn the admiration of my peers—we make an instrumental use of our reason. There are certain means required to achieve the proposed end, and reason instructs us—in the form of hypothetical imperatives—about such means. Moral duties, however, are not based on inclination. They are embodied in maxims that are universally

31. KANT, *supra* note 21, at 14.
32. *Id.*
33. *Id*.

valid, meaning that they are valid irrespective of—and even against—one's inclination. That is why the supreme principle of morality or the moral law is the categorical imperative—it is not conditioned by the contingencies of inclination. But what can be the source of an imperative that is valid universally? Kant argues that it can only be the will or reason in its practical use, not as an instrument of inclination but as a giver of universal laws.[34] Our moral duties, then, are the ends that reason sets for us, as opposed to the ends that stem from inclination and for the sake of which we borrow reason's resources. The rule of the passions is heteronomous because it subjects the will to ends external to itself; the rule of morality, on the contrary, is autonomous, because it is authored by the will.[35] A different formulation of the categorical imperative is hence: "act only so that the will could regard itself as at the same time giving universal law through its maxim."[36] In this way, "the will is not merely subject to the law but subject to it in such a way that it must be viewed as also giving the law to itself . . . of which it can regard itself as the author."[37]

Now when a person acts on a maxim that passes the test furnished by the formula of the universal law, the end that he seeks is universally valid. It is not borrowed from inclination but from practical reason. That means that the person is acting on a principle that is not hers but everyone's. In a community where every person is a good will, therefore, every individual's actions are everyone's actions, because they are all sanctioned by the common will. All that you do to me is just as much a product of my will as all that I do myself, for so long as we are moved by respect for the law each and every instance of human action is commonly willed. The law which inspires our actions is authored by us qua free and rational beings. That is the ideal community that Kant describes as a "kingdom of ends . . . a systematic union of various rational beings through universal laws."[38]

In the kingdom of ends every member is a sovereign lawgiver, for everyone's actions are governed by universal laws. Yet it is critical that we remember Kant's insistence that goodness is a property of the will. If everyone happens to conform to the moral order but fails to act from duty, what appears to be a kingdom of ends is in fact a kingdom of legality. And just as preserving one's life from inclination "has no inner worth and . . . no moral content," a kingdom of mere legality has no moral worth whatsoever.[39] Enforcing morality is thus self-defeating.

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34. *See id.* at 39–40.
35. *Id.* at 41.
36. *Id.* at 42.
37. *Id.* at 39.
38. *Id*. at 41.
39. *Id.* at 11. Allen Wood writes correctly that:

## IV.

Let us now turn to three additional reasons for upholding the HP: self-government, experimentalism, and individualism. I shall examine each of them in turn.

*Self-government.* Paternalism is often premised on the idea that ordinary people, while naturally endowed with the rational and volitional capacities required to form and execute a worthy life plan, more or less systematically fail to put such capacities to use. If they are left to their own devices, they will exhibit a wide range of deliberative pathologies, such as laziness, cowardice, recklessness, profligacy, gluttony, lust, envy, wrath, selfishness, and many other vices that lead to actions that may not be perilous to others but are usually harmful to the agent. Human beings, on this view, are naturally prone to make bad decisions, either because they do not always subject their actions to rational scrutiny or because they are liable to suffer from *akrasia*—weakness of the will.[40] The law may assist them in pursuing what is good for them, preventing or at least discouraging bad choices, that may be achieved through a variety of means, ranging from the old-fashioned "repression of vice" through criminal law to the "architecture of choice" through regulations that nudge people in the supposedly right direction—say, setting up the default baseline to increase the likelihood that people will save enough money for retirement or avoid the consumption of unhealthy foods.[41]

It cannot be denied that people occasionally make bad choices by their own reasoned criteria of goodness, and that some people are or let themselves become systematically poor choosers. But I think that those of us who

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> Kantian morality . . . is never about the social regulation of individual conduct. It is entirely about enlightened individuals autonomously directing their own lives . . . From a Kantian standpoint, any use whatever of social coercion in any form to enforce ethical duties . . . must be regarded as a wrongful violation of individual freedom by corrupt social customs.

Allen Wood, *The Final Form of Kant's Practical Philosophy*, 306 SOUTHERN J. PHIL. 1, 9 (1997).

I do not think this is true of Kantian morality only—Kant's points about the nature of moral value seem to me valid for any morality that is worth taking seriously philosophically, whether or not his views about morality's source—practical reason—and content—the categorical imperative—are to be accepted.

40. *See* CHRISTOPHER BOBONICH & PIERRE DESTREE, *Introduction* to *AKRASIA* IN GREEK PHILOSOPHY xv (2007).

41. *See* RICHARD THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS passim (2008).

believe in democratic governance are necessarily committed to two further propositions that greatly mitigate such concerns: that most people are able to make reasonable choices on most occasions and that it is unnecessary and inappropriate to restrain or manipulate people's choices.

If we are committed to democracy, we must believe that ordinary people who vote for their representatives in elections or for particular policy options in referendums are normally capable of forming and acting upon reasonable judgements; democratic governance presupposes a large measure of confidence in the deliberative capacity and discipline of the addressees of the law, since they are ultimately the law's authors. There is something slightly odd about paternalist legislation in a democracy, since those who sponsor it are not shepherding but representing the people, and will have to answer before it for their decisions. Of course, we might argue that democratic accountability is precisely what makes such laws legitimate, since ordinary people are given a chance to judge whether they are in fact good for them or not. But that argument only works for piecemeal proposals of paternalism meant to target the most serious and undisputed cases of poor choice; if paternalist reasons become commonplace grounds of legal control, the whole apparatus of representation and accountability in which democracy is grounded is brought to disrepute. Ordinary people cannot consistently be regarded as both poor choosers and disciplined voters.

In fact, the association of individual freedom with collective self-government is even closer. Democratic legitimacy rests on the political equality of the citizens, the notion that each of them should have an equal say in issues concerning their life in common; "one person, one vote" expresses the equal worth of their opinions. But what makes majority rule necessary is the fact that in other-regarding areas of human action we cannot allow each person the perfectly self-governing path of following her own opinion—collective action is indispensable if we wish to avoid the injustice and inefficiency of social chaos.[42] In self-regarding areas, however, there is no need for collective action, no demand placed upon the people that they fashion a single decision from the plurality of opinions that flourish amongst them; on the contrary, in such matters democracy can give way to the purest form of self-government embodied in the unrestrained exercise of individual freedom.[43] Any attempt to divert the resources of democratic

42. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 101–03 (1999).

43. *See* MILL, *supra* note 4, at 8. In the words of Jurgen Habermas, "individual freedom and collective self-government are 'co-original' values." JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 134–35 (1998).

governance towards the regulation of self-regarding conduct should thus be regarded with apprehension and mistrust.[44]

Still, no amount of confidence in the self-discipline of voters and no awareness of the necessary bond between democracy and freedom will shove away the evidence of notoriously bad choices and lifestyles, those "things which have been tried and condemned from the beginning of the world."[45] And there is now a large literature in behavioral economics and social psychology teaching us how and where we fail miserably at the task of making rational decisions. But there is a big difference between informing people about their decisional biases and flaws or educating them to become more conscious and disciplined decision-makers, and coercing, manipulating, or just nudging them. Denying the deliberative potential of ordinary people, their ability to improve the mastery over the passions and environments that corrupt disciplined decision-making, and rushing to repress their bad choices or taking advantage of their biases to promote their own well-being, seems hardly befitting of their dignity as choosers—their worth as rational beings.[46]

*Experimentalism.* Mill argues for freedom of expression on what we might call—following Karl Popper—"fallibilist" grounds, namely that free and open discussion of our opinions, including those that are widely, sincerely, and passionately held, is the very condition which makes them reasonable and worthy of our allegiance.[47] Our beliefs are justified to the extent that they survive the challenge mounted by those who oppose them in debate—insofar, therefore, as they have not yet been refuted. Far from being a nuisance or a threat to ourselves, those who disagree with us and who put our convictions to trial are to be shown appreciation for their contribution to our intellectual development. He writes that "[i]f all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[48] The point here is not that freedom of expression is so valuable to the

44. No doubt that is why Mill begins his essay with cautionary words about the dangers that popular government may represent for individual freedom, going as far as invoking Alexis de Tocqueville's admonitions against "the tyranny of the majority." *See* MILL, *supra* note 4, at 6–11.

45. *Id.* at 89.

46. *See* Jeremy Waldron, *It's All for Your Own Good*, N.Y. REV. BOOKS (Oct. 9, 2014) http://www.nybooks.com/articles/2014/10/09/cass-sunstein-its-all-your-own-good/ [https://perma.cc/B5WS-KZPG].

47. MILL, *supra* note 4, at 24.

48. *Id.* at 21.

individual that it balances off the inconvenience it may represent for those, however numerous, who dislike or are distressed by opinions contrary to their own. Mill's claim is that being challenged in our beliefs and feeling compelled to argue for our convictions is always a benefit to us because it contributes to intellectual progress one way or another. Either our opinions prevail in debate, in which case defending them reinforces our conviction in their truth; or our opinions are refuted, in which case failing to uphold them allows us to recognize their falsehood; or our opinions are partly true, and it is by confronting them with other partly true opinions that we are given a chance to improve our understanding of the issues under discussion.[49] The importance of unimpeded confrontation of ideas is so vital in the quest for truth that Mill would want us to manufacture it in areas where public opinion has evolved towards a consensus.[50]

The benefits of vigorous intellectual exchange are, however, not limited to the selection of true beliefs and the eradication of error. Mill stresses that there is a wide gap between holding a true belief and being in possession of a truth; the latter requires an understanding of the meaning and the grounds of the proposition expressing it. It is one thing to be able to regurgitate from memory the multiplication table and quite another to understand the meaning of each multiplication operation and the arithmetic grounds upon which they rest. Mill is concerned that intellectual complacency and social conformism will lead to opinions being "held as a dead dogma," debasing even the most justified beliefs to the point of becoming "one superstition the more, accidentally clinging to the words which enunciate a truth."[51] The possession of truth requires the sort of mental alertness and intellectual energy that can only be triggered by having our opinions openly, continuously, and fiercely challenged, preventing their severance from the "inner life of the human being."[52]

But Mill is not satisfied that there is ample room for people to nurture and confront their opinions. He insists that they should be allowed the freedom to put their opinions to practice, to try and experience the lifestyles which such opinions support. His attitude on this point is experimentalist: he believes that we can only know what is right and good if we try our opinions in the court of practice and observation. He writes: "As it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living . . . and that the worth of different modes of life should be proved practically, when anyone

49. *Id*. at 59.
50. *Id.* at 49–50.
51. *Id.* at 40–41.
52. *Id.* at 46.

thinks fit to try them."[53] Experiencing alternatives and observing the like experiments of others provides empirical vindication for our practical judgments. Again, the point is valid even if there is little doubt that some choices are bad; it is by confronting the misery into which "gambling, or drunkenness, or incontinence, or idleness, or uncleanliness" leads that we renew our understanding and appreciation of the self-restraint that otherwise may strike us as an unnecessary deprivation of pleasure and fun.[54] We owe those who furnish us with examples of eccentric behavior and even moral debasement every bit as much as we owe those whose opinions are unmeritorious for allowing us to reinforce the ground where we stand.[55] Just as freedom of speech is the basis of our intellectual development, freedom of action is the cornerstone of our ethical flourishment.

*Individualism.* Mill also points our attention to the link between goodness and individuality. What is good for one person is not necessarily good for another, and what is good for most is not necessarily good for all. He is skeptical of the view, held by Aristotle and those who followed in his footsteps, that there is a single form of good life grounded in the specific nature of human beings as rational animals. His view, closely allied to the liberal romanticism of Wilhelm von Humboldt and J. W. Goethe, is that the greater the degree of intellectual development and the wider the range of experience of human beings, the more they will seek those goods which express their different individualities.[56] The emphasis is on the growth of individual diversity from the common basis of the species: "[h]uman nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing."[57] For individuality to express itself, for each person to develop the attributes of human nature that are peculiarly hers, there has to be freedom of action; democratic laws that meddle with the self-regarding area of human life sacrifice singularity, character, and eccentricity on the altar of mainstream opinion: "[t]o give any fair play to the nature of each, it is essential that different persons should be allowed to lead different lives."[58]

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53. *Id.* at 62.
54. *Id.* at 89.
55. *Id.* at 71–74.
56. *See* John Gray, *Introduction* to MILL, *supra* note 4, at xiv–xv.
57. MILL, *supra* note 4, at 66.
58. *Id.* at 70. Mill's critique of social moralism through custom is particularly vitriolic here, and borders on self-presumptuous elitism; he disparages the "tyranny of

Perhaps Mill goes a little too far in making an argument out of his overt romance with the individual. But his words convey a fair warning against the danger of majorities and their representatives using the legislative process to express prejudice and bigotry, and of them not even realizing it. We are prone to confuse what is normal in the strictly empirical sense of frequent with what is normal in the normative sense of right.

## V.

I have argued that the HP is grounded not in a single ground but in a plurality or coalition of partly overlapping and partly complementary grounds, namely equal respect, moral worth, self-government, experimentalism, and individualism. I do not deny the possibility that even adding all of these up there might be tiny interstices left in the area covered by the principle; I meant to make a general case for the HP, not to answer the challenge of a moralist lawmaker wearing a magnifying glass.

But I want to deal briefly with the more serious challenge posed by those who claim that the HP is an empty formula because no acts are strictly *self*-regarding, except the most morally trivial and politically insignificant—say, brushing one's teeth with whitening toothpaste or ordering one's steak medium-rare. Even decisions that on the surface appear to fall squarely within the range of self-regarding behavior, namely those pertaining to one's religious or sexual practices, turn out to be socially relevant once account is taken of the distress and revulsion that people of mainstream sensibility experience when they witness the public exhibition of deviant lifestyles or are simply aware of their existence. Other seemingly private choices, such as the idleness of a talented individual who deprives the community from the advantages of his productive potential, the smoking habit of a patient of the public health service, or the decision not to procreate of a couple in a society with a low birth rate, have an adverse impact on other people, such that it would be question-begging not to count them as "harms." In fact, virtually no act in the territory disputed between moralists and liberals fulfills unequivocally the requirements of the HP, which leads us to the bizarre and sinister conclusion that on Mill's own grounds there is no limit to the "authority

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opinion," and the "despotism of custom," and writes, conceivably in a self-regarding spirit: "Genius can only breathe freely in an *atmosphere* of freedom." *Id.* at 74, 78. "Persons of genius are, *ex vi termini, more* individual than any other people—less capable, consequently, of fitting themselves, without hurtful compression, into any of the small number of moulds which society provides in order to save its members the trouble of forming their own character." *Id.* at 72.

of society" over the individual. Critics of the HP have often relied on this argument to discredit it as incoherent and useless.[59]

The criticism is nevertheless misguided in two important ways. First, it is based on a misunderstanding of the principle. The HP does not offer a complete account of legitimate legal control; the other-regarding nature of an act is not a sufficient warrant for collective interference with individual choices, requiring as well a judgment balancing the reasons for and against it. The weight of the social interests endangered or compromised by the exercise of individual liberty must be such as to justify the legal restriction of the latter.[60] In sum, the HP merely establishes a necessary condition for the legitimacy of restrictive laws: the acts subject to legal control must be other-regarding. Moreover, the principle does not really concern the selection of acts or behaviors, but of the *reasons* which may be legitimately offered to support restrictive laws. Accordingly, while it does not absolutely rule out public control over eating habits, professional decisions, sexual behavior, religious practices, and other choices that are generally regarded as private, the HP filters paternalist and moralist motives out of the set of reasons offered in support of those measures, weakening considerably the case for them. In practice, then, there is a significant domain of human behavior insulated by the principle from legal interference—and that is how we should interpret references by Mill and other liberals to a non-trivial category of self-regarding acts.

A second error of the critics concerns the interpretation of "harm." It is often assumed that the HP deploys a naturalist or "value-neutral" concept of harm, defined as any inconvenience or disadvantage incurred by at least one person according to that person's own criteria of well-being. Under such a broad account of harm, there is no doubt that the HP ends up doing very little of the filtering function that it is supposed to serve; moral distress, for instance, including the bare knowledge—or even the suspicion—that other people have lifestyles that one disapproves of very strongly, will have to be counted as a harm. These worries have led many advocates of the HP to substitute far more complex notions—such as "individual rights" and "basic interests"—for the concept of harm, apparently unaware of the self-defeating character of the move: the HP furnishes the criterion to determine what rights individuals have or what interests are worthy of legal

59. *See, e.g.*, Bernard Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

60. MILL, *supra* note 4, at 16.

protection, such that relying on these to define harm embodies a vicious circularity and the inevitable downfall of Mill's project of asserting "one very simple principle . . . to govern absolutely the dealings of society with the individual."[61] The obvious alternative is to understand Mill's concept of harm in light of his overall argument for individual freedom. As Jeremy Waldron puts it:

> The problem of whether moral distress should be regarded as harm for the purposes of Mill's principle is not one that can be resolved by a logical analysis of the concept of harm or by looking up 'harm' in the dictionary . . . Once we are faced . . .with rival conceptions of harm, the question is then not what 'harm' really means, but what reasons of principle there are for preferring one conception to another in the present context . . . [T]he question is . . . which conception answers more adequately to the purposes for which the concept is deployed. In the context of *On Liberty*, those purposes are established by Mill's arguments for freedom of opinion and lifestyle, that is, by his account of what we have to lose if liberty in those areas is withheld.[62]

Now if we approach the problem of moral distress from the angle of Mill's experimentalist defense of freedom, there cannot be any doubt that he did not regard it as a harm but indeed as a good.[63] It is not enough to assert, as H.L.A. Hart does, that "a right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognizes individual liberty as a value."[64] That begs the question of the value of liberty. As we have seen, confronting rival, even eccentric, opinions and lifestyles, and feeling pushed by them to argue for and find the meaning in those that are conventional, is for Mill one of the chief reasons to uphold the HP. Distress triggers the use of the "mental and moral muscles" indispensable to the intellectual and moral progress of human beings, and is thereby something which society should not seek to control but treasure and nurture.[65]

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61. *Id.* at 13–14. Mill cannot be wholly exempted from lapsing into that error—see his musings over "rights" and "interests," *id.* at 83–84, and over "assignable obligations," "definite duty," and "constructive injury," *id.* at 90–91.

62. Jeremy Waldron, *Mill and the Value of Moral Distress*, 35 POL. STUD. 410, 413–14 (1987).

63. *Id.* at 417–18.

64. *See* HART, *supra* note 1, at 46.

65. *See* MILL, *supra* note 4, at 65.